In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. ———

———

DOROTHY SCHWARTZ,

Petitioner,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,

Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

———

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the final orders and judgments of the Supreme Court of Ohio entered on February 3, 1972 dismissing her appeal without opinion and denying her motion for an order directing the Court of Appeals for the First District of Ohio to certify its record to the Supreme Court of Ohio, appended hereto on pages 19, 20, 21 of the Appendix.

The opinion of the Court of Appeals of the Second District of Ohio was returned on October 12, 1971, is not reported and is appended hereto in the Appendix, pp. 22-24. The application of the Petitioner to reconsider was denied by the Court of Appeals on October 21, 1971 without opinion and there are no other opinions

except a letter from the Trial Court overruling the Petitioner's Motion for a new trial appearing on pp. 22-27 of the Appendix. They have not been reported.

Also, a Motion to the Court of Appeals for the First Appellate District of Ohio by the Petitioner to certify the case to the Supreme Court of Ohio for hearing on the merits which among other things contended that the decision was in conflict with *Dorsten* v. *Lawrence*, 20 Oh. App. (2d) 297 was filed by the Petitioner and denied by the Court of Appeals. There is no reported opinion, and a copy of the Entry Overruling the Motion to Certify is appended hereto on p. 25 of the Appendix.

This case involves a suit in the Court of Common Pleas at Cincinnati, Ohio by the Petitioner for damages for personal injuries allegedly sustained due to the negligence of the Respondent. In a jury trial Petitioner claimed that while she was on the premises of the Respondent as a business guest or invitee she was struck by a laundry cart operated by an employee of the Respondent in the hallway of the hospital.

The jurisdiction of this Court to consider the Federal Constitutional issues is conferred by *Title 28, Section 1257 (3), U.S.C.* as follows:

> "Final Judgments or Decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or where any title, right, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised, under the United States."

We submit that the following cases sustain the jurisdiction of the Supreme Court to review the judgment in this case:

(1880) *Williams* v. *Bruffy*, 102 U.S. 248, 26 L. Ed. 135,
(1945) *Hooven and Allison Co.* v. *Evatt*, 324 U.S. 652, 89 L.Ed. 1252, 65 S. Ct. 870,
(1927) *Tunney* v. *Ohio*, 273 U.S. 510,
(1937) *Honeyman* v. *Hanan*, 300 U.S. 14, 81 L.Ed. 476, 57 S. Ct. 350.

The questions presented by this appeal are as follows:

Whether the Petitioner has been deprived of her right to due process of law and equal protection of the law by the State of Ohio under Section 1 of the 14th Amendment to the Constitution of the U. S. where:

(1) The State Courts permit the introduction in evidence in a civil jury action for personal injuries exhibits which are her hospital records reciting on the front pages the fact that she is Jewish, thus injecting religion into the case.

(2) The Court admits into evidence the hospital record of the Respondent relating to Petitioner's post-accident treatment which contains in its history a report of the manner of the occurrence of the accident attributible to the Petitioner which she does not admit having made which is inconsistent with her testimony.

(3) The Court of Appeals fails to comply with the rule of the Supreme Court of Ohio requiring it to state in writing the reason for its decision on every error assigned.

(4) The Supreme Court of Ohio dismisses the appeal and denies the motion to certify, and thus, causes its prior reported decision as to the inadmissibility of portions of the history of the hospital record to remain unreversed as the law of Ohio and to be applicable to all persons other than the Petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the U. S. Constitution is as follows:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, Section 1 to the U. S. Constitution is as follows:

> "§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

AUTHORITIES IN SUPPORT OF QUESTIONS PRESENTED BY APPEAL

We submit the following authorities in support of the questions presented by this appeal, namely as to whether the Petitioner has been deprived of her rights to due process of law and the equal protection of the laws by the State of Ohio:

(1) May the religion of the Petitioner be injected into the case by information contained in hospital records offered by the Respondent and admitted by the Court?

This Court has recognized freedom of religion as not being subject to infringement or interference or in any

other way the subject of state action, under the due process clause of the 14th Amendment:

Epperson v. *Arkansas*, 393 U.S. 9,
School District of Abington Township v. *Schempp*, 374 U.S. 203,
Fowler v. *Rhode Island*, 345 U.S. 67.

The disclosure of a person's religion, which results where children on request can be excused from school prayers abridges freedom of religion under the 14th Amendment, *School District of Abington Township* v. *Schempp*, 374 U.S. 203.

The 14th Amendment to the U. S. Constitution includes under its protection the activity of a State Court:

Sheppard v. *Maxwell*, 384 U.S. 333.

In Ohio in the case of *Acry* v. *Bauman*, 134 Oh. St. 449 by decision of its Supreme Court it was held that the injection of religion or race into the trial of a law suit is per se prejudicial. In this regard, the statement of the Supreme Court of Ohio on p. 45 sets forth the great danger and prejudice if matters of this sort are allowed in the Court room:

> "It is common knowledge that racial prejudice is easily aroused, and when injected into a case, more often than not, becomes a factor which controls and dominates the minds of jurors to the exclusion of any other consideration, preventing their fair and deliberate judgment upon the issues submitted to them for determination."

Does the failure of the Petitioner to expressly object to her religious identification deprive her of her rights under the 14th Amendment?

No special objection was made by the Petitioner, although she did not expressly consent to the admission of

such evidence. This raises the question of the responsibility of the Court to see that order is maintained in the Court from disturbing influences, of which race and religion would be the worst and that the rights of the parties are protected. The Judge has the responsibility to exclude sua sponte bigotry from the court room. Public interest requires that such matters not have a place in the Court room.

In *53 Am. Jur. 73, Sect. 74* it is stated:

> "The judge conducting the trial is not a mere moderator but the governor of the trial for the purpose of assuring its proper conduct and the fair and impartial administration of justice between the parties to the litigation."

A judge is not an umpire, but he is vested with the obligation to see that justice is done:

> *Glasser* v. *United States*, 315 U.S. 60;
> *Quercia* v. *U.S.*, 289 U.S. 466;
> *Scott* v. *Spanjer Bros., Inc.*, 298 F. (2d) 928.

On p. 332 of *Evans* v. *Moseley*, 84 Kansas 322, 114 Pac. 374 the Court stated:

> "The trial judge is not an automaton or mere umpire."

Thus, in *52 Oh. Jur. (2d) 570, Sect. 81* there is the text statement:

> "It should be noted in this connection that it is the duty of the judge during the trial, where evidence is sought to be introduced which is not only incompetent but which is calculated to prejudice the jury to interpose and correct the wrong immediately without waiting to be reminded of it by counsel."

In the Ohio case of *Dayton Folding Box Co.* v. *Ruehlman*, 11 Oh. CC. (N.S.) 493, 494, this principle of law is acknowledged:

> "This duty is ever present with the judge during the trial, and when the evidence is sought to be introduced which is not only incompetent but which is calculated to prejudice the minds of the jury, it is the duty of the judge to immediately interpose and correct the wrong without waiting to be reminded of it by counsel."

(2) Is the portion of the history of the hospital record of the treatment of the Petitioner containing a report as to the manner of the occurrence of the accident attributable to the Petitioner admissible when she doesn't admit having made it?

In this regard, the hospital record of Petitioner's post-accident treatment was made by the Respondent, and sets forth in its history a report attributable to the Petitioner as to the manner of the occurrence of the accident in conflict with that testified to by the Petitioner. The admission of such evidence is contrary to the decision of the Supreme Court of Ohio in the case of *Green* v. *City of Cleveland*, 150 Oh. St. 441. This case holds that where such history was not necessary for diagnosis or treatment, it should not be submitted to the jury as evidence. The reason for such ruling is quite evident, in that Petitioner never had the right to cross-examine the physician employed by the Respondent who made the record and was not called by it to testify. Such evidence is hearsay and is so extremely prejudicial as to warrant reversal, as previously cited by the Supreme Court of Ohio in *Green* v. *City of Cleveland*, 150 Oh. St. 441.

The fact that the decision of the Supreme Court previously referred to is still the law of Ohio has been recently indicated in the case of *Dorsten* v. *Lawrence,* 20 Oh. App. (2d) 297 decided on December 10, 1969 by the Court of Appeals, for the 6th Appellate District.

On page 301 in *Dorsten* v. *Lawrence,* the Ohio Court of Appeals stated its decision as to the inadmissibility of the hospital records was based on *Green* v. *City of Cleveland,* 150 Oh. St. 441.

(3) May the Court of Appeals fail to comply with the Rule of the Supreme Court of Ohio requiring it to state in writing in an opinion the reason for its decision on each error assigned?

Article IV, Section 5 of the Ohio Constitution which is appended hereto on pp. 28-29 of the Appendix confers on the Supreme Court the right to prescribe rules governing practice and procedure in all Courts of the State. Pursuant thereto the Supreme Court of Ohio enacted Ohio Appellate Rule No. 12, which is appended hereto on page 30 of the Appendix which expressly provided "all errors assigned and briefed shall be passed upon in writing, stating the reason for the Court's decision."

It should be evident from the reading of the opinion of the Court of Appeals which appears on pp. 22-24 of the Appendix that there has been no compliance with this rule. No reasons have been given for rulings on most of the errors assigned other than those which are superficial and general and not a single case has been cited, in spite of the fact that the Petitioner cited fifty-eight cases

and twenty-two authorities in her brief in support of her appeal and Assignment of Errors in the Court of Appeals.

The importance of the Trial Court or an Appellate Court writing an opinion which gives reasons for its decisions was previously determined by this Court in regards to the actions of Federal Courts.

> *Railroad Commission of Wisconsin* v. *Maxcy*, 281 U.S. 82, 83;
> *Baltimore and Ohio RR. Co.* v. *United States*, 279 U.S. 781;
> *Public Service Commission of Wisconsin* v. *Wisconsin Tel. Co.*, 289 U.S. 67.

This Court recently stated in its opinion that to deny a citizen the right to know constituted: "I can imagine no greater perversion of history . . ."

> *New York Times Company* v. *United States*, 91 Sup. Ct. Rept. 2140, 2143.

(4) Do the State Courts by permitting the hospital records to be evidence in the case subject the Petitioner to different law than is applicable to other persons in the State of Ohio?

The Supreme Court of Ohio did not reverse its previous decision in *Green* v. *City of Cleveland*, 150 Oh. St. 441 in this case. It merely dismissed Petitioner's appeal on constitutional grounds and denied her motion to certify the record. The result is that the portion of the record containing the report in the history as to the manner of the occurrence of the accident attributable to the Petitioner which is inconsistent with her testimony, and which she did not admit having made was permitted to be admissible as to her. In all other cases such evidence is inadmissible

and reversible, prejudicial error. The decision of the Supreme Court holding such evidence inadmissible was recently followed in the reported opinion of the Court of Appeals of the 6th Appellate District of Ohio in the case of *Dorsten* v. *Lawrence*, 20 Oh. App. (2d) 297.

The Supreme Court has interpreted the Constitution of the United States so as to protect the rights of persons against state action which denies them the equal protection of the laws on many occasions.

Louisville Gas and Electric Co. v. *Coleman*, 277 U.S. 32,
Hartford Steam Boiler Inspection Insurance Company v. *Harrison*, 301 U.S. 459.

In addition, "The equal protection" provision of the 14th Amendment has been held applicable to Courts, so that Courts should correct violations of this provision by state Courts.

Shelley v. *Kraemer*, 334 U.S. 1,
Bogni v. *Perotti*, 224 Mass. 152, 112 N.E. 853.

STATEMENT OF THE CASE

Petitioner, Dorothy Schwartz was the business guest and invitee of the Respondent, The Jewish Hospital Association of Cincinnati for the purpose of assisting her sister-in-law, an out patient at the Jewish Hospital operated by the Respondent. She was in the main hall of the hospital and had opened the door to the Physical Therapy room for the purpose of entering it when she was struck by a supply cart pushed by an orderly, and she sustained serious and permanent injuries as a result thereof. She had been summoned by the Respondent in the waiting room and directed to take the patient home. She was en route when struck and had not as yet entered the room.

It is undisputed that the cart was loaded with linen and surgical supplies above the level of the eyesight of the orderly and that he was not able to see in front of him. The principal dispute, since the case involves the issues of negligence and contributory negligence relates to the location and position of the Petitioner when she was struck and her activity at the time. The Respondent denied Petitioner's version of the accident to which she testified and claimed that she was exiting the Physical Therapy room and walked into the front of the cart, whereas she claimed that the cart struck her in the rear as she was entering the room. She was afterwards treated at the Respondent's hospital and at another hospital in Cincinnati.

During the trial, three sets of hospital records which are Exhibits No. 31, which is the record of her treatment at Respondent's hospital, Exhibit No. 25 which is the record of her treatment at another hospital post-accident, and No. 23 which is a record of surgery which was performed on her in 1941 were admitted as Respondent's Exhibits (pp. 265, 315, and 349 R.). While Petitioner did not expressly consent to the introduction of these exhibits, she did not specially object to them except as to the material contained in Exhibit No. 31, (pp. 349, 350 R.) which contained the report of the Jewish Hospital records made by the Respondent's resident physician who treated her *"patient was wheeling her sister-in-law in the corridor of the Jewish Hospital when she was knocked over by a laundry cart landing on her right side."* The portion of the record relating to introduction of these exhibits and her special objections to the report of the resident based on the case of *Green* v. *City of Cleveland,* 150 Oh. St. 441, which cases are practically identical was overruled by the Trial Court as appears on p. 350 R. which is appended as page 40 of the Appendix. Respondent by offering the Exhibit resisted Petitioner's objection. In addition,

in her motion for a new trial filed after there was a verdict and judgment for the Respondent she expressly raised the objection that the Court had erred in admitting these records. She also raised the issue that the hospital records which are the Exhibits previously referred to also contained on their face sheets the information that she was of the Jewish religion, and one gave the name of the congregation to which she belonged. The motion for a new trial was overruled by the Court of Common Pleas on March 31, 1971. A portion of the Memorandum for the new trial setting forth this matter and her objection to the introduction of the history is set forth on pp. 7 and 8 of the Memorandum in Support of the Motion for a new trial, which is appended hereto as page 41 of the Appendix.

Subsequently, she filed an appeal to the Court of Appeals for the First District of Ohio. Her Assignment of Errors is appended at pp. 33-34 of the Appendix. Excerpts from her brief in the Court of Appeals are appended hereto on pp. 34-35 of the Appendix.

The Court of Appeals for the First Appellate District of Ohio, on consideration of the appeal affirmed the judgment of the trial Court and rendered the opinion which is attached hereto, on pp. 22-24 of the Appendix. It will be noted that many of the Assignments of Error are decided in general terms. Without assigning any specific reasons, it contained such language as "no abuse of discretion on the part of the trial Court in admitting into evidence the exhibits and testimony complained of by the Appellant," and further language such as "not well taken," "no abuse of discretion," "is not borne out by the record," "is not well taken" etc.

An Application for Reconsideration after this decision was rendered was filed by the Petitioner which is appended hereto on page 36 of the Appendix. The decision of the Court of Appeals, on the Application to Reconsider

which is not reported, which likewise gives no reasons is attached hereto on page 39 of the Appendix. Among the reasons for reconsideration advanced by the Petitioner were "the decision of the Trial Court and of this Court violates the rights of the plaintiff under the Ohio Constitution and the Constitution of the United States . . . . injection of religion into this case violates Article I; Section 6 of the Ohio Constitution, the First Amendment and the 14th Amendment of the United States Constitution." This argument is appended hereto on page 42 of Appendix. It was also argued that the Court had failed to comply with Rule 12 (A) of the Ohio Rules of Appellate Procedure requiring the Court of Appeals to state the reasons for its decision, and thus deprived Petitioner of the due process provision of the 14th Amendment to the U. S. Constitution. (pp. 5 and 6 of the Brief of the Appellant for Reconsideration.) This Rule which is attached hereto on page 30 of the Appendix was enacted by the Supreme Court of Ohio pursuant to Article 4, Section 5, of the Ohio Constitution which is appended on pp. 28-29 of the Appendix.

Thereafter, an appeal was taken to the Supreme Court of Ohio by notice of appeal which expressly provided that the appeal was on constitutional grounds, including the 1st Amendment to the United States Constitution and the 14th Amendment to the United States Constitution. The Notice of Appeal is appended hereto on pp. 32-33 of the Appendix. Appended hereto on pp. 30-31 of the Appendix are the Propositions of Law Nos. 2, 12, and 13 which show that the Petitioner claimed violation of rights under the 1st and 14th Amendment to the Constitution of the United States before the Supreme Court of Ohio. The Supreme Court of Ohio on February 3, 1972 dismissed Petitioner's appeal without opinion, the order of the Court being appended hereto on pp. 19-20 of the Appendix and also denied Petitioner's Motion for an order to the Court of Appeals to certify the record, without opinion

which is not reported and which is appended hereto as p. 21 of the Appendix.

ARGUMENT

Freedom of religion has been protected by this Court in the public streets, public property, assembly rooms and schools. It should be evident that it has even more place in a Court room.

To say that evidence as to the disclosure of the identity of the religion of a person of a minority race is not prejudicial is to close one's eyes to 2000 years of history. Moreover, it must be considered that it was the Respondent and not the Petitioner who offered the complete hospital records including the matter of racial identification. The evidence became the Respondent's and not the Petitioner's exhibit which the jury carried into the jury room.

While Petitioner could have probably more diligently called this matter to the attention of the Court at the time when the evidence was introduced, it can hardly be said that she consented to the introduction of evidence which gives rise to bigotry in the trial of a law suit. Under the stress and tension of a trial, counsel sometimes fails to meet every problem that arises. The Courts also have some responsibility where the evidence is visible on its face, being on the front page of the hospital records.

This Court has held that it may consider an error even where no objection was made, especially where it is of the kind which denies a fair trial.

United States v. *Ballard*, 322 U.S. 78, 87,
Johnson v. *United States*, 318 U.S. 189,
United States v. *Atkinson*, 297 U.S. 157, 160,
Clyatt v. *United States*, 197 U.S. 207, 221.

The rights of the public are paramount when it involves due process of law, whether a party objects or not.

> *Thompson* v. *Utah*, 170 U.S. 343, [overruled on other grounds in *Williams* v. *Florida*, 399 U.S. 78].

The importance of the principle that religious freedom under our constitution requires that a litigant not be penalized because she has different religious beliefs than the jury was established by this Court in *United States* v. *Ballard*, 322 U.S. 78, 87 when it stated:

> "If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."

Plaintiff submits that the 14th Amendment applies equally to civil and criminal cases, embracing "life, liberty, and property" and covers Petitioner's religious freedom, especially in a courtroom.

It is the identity of a person not subscribing to the religious or political beliefs of the majority which is protected and not permitted to be disclosed by the 14th Amendment.

> *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589;
> *Engel* v. *Vitale*, 370 U.S. 421.

The Trial Court, the Court of Appeals and the Supreme Court of Ohio all ignored Petitioner's argument relating to religion being injected in this case. Not a single word was said by any of the Courts. Is this a matter to which Courts can shut their eyes? Is there no prejudice when on three different occasions, by reason of Exhibits which the jury takes into the jury room, in effect the following is admitted as Respondent's evidence:

"Q. State your name.
A. My name is Dorothy Schwartz.
Q. What is your religion?
A. I am Jewish."

On another occasion, the following question was in effect asked by the Respondent:

"Q. Of what religious congregation are you a member?
A. The Adath Israel Congregation."

If even public media, such as the press, radio and television have recognized that reference to a person's ethnic background tends to degrade, humiliate and prejudice him and have eliminated it, can our Courts do less?

The Respondent, in spite of its name is not a religious institution but a community hospital, which receives tax money, has tax exemptions, employs people of all races and religions and has patients of all races and religions. Further, the judge and the jury were not Jewish, nor was defense counsel. The exhibits were not only of the Jewish Hospital but also of the Good Samaritan Hospital, which has no Jewish affiliation whatsoever.

The jury could very well have followed the ancient exhortation "a plague on both of your houses."

(1) It is, therefore, difficult to reconcile the verdict unless the Petitioner's religion reacted to her prejudice. This was practically a case of absolute liability. The cart was being pushed in the main corridor by Respondent's employee and was loaded above his eye sight so that he could not see in front.

(2) Also, there is no reason whatsoever why a Court's decision should be entirely disregarded. *Green* v. *City of Cleveland*, 150 Oh. St. 441 is still the law of Ohio except as to the Petitioner.

This situation is further aggravated by the fact that the Court of Appeals of the First Appellate District of Ohio failed to give reasons for its decision. It did not distinguish between Petitioner's case and *Green* v. *City of Cleveland* or explain why *Green* is not applicable. The same situation is true as to the other assigned errors, including why Petitioner's claim of her violation of religious freedom was not upheld.

(3) There is no explanation anywhere by the Ohio Courts or even any suggestion at any place in the record, including the Trial Court why the Petitioner should be subjected to different rules of law than have been laid down by the Supreme Court of Ohio. It is evident that she has been denied the equal protection of the laws.

She has argued all these matters at length, as evidenced from the portions of the briefs attached hereto, and there has not been one single word by any of the Ohio Courts as to any of the issues which she raises.

Petitioner submits that the questions on appeal are such as to clearly show that her rights under the Constitution of the United States have been violated in more than one respect, and the immunities and privileges which are granted by the Constitution of the U. S. have been completely denied to her by the State of Ohio.

The questions raised in this Petition are of great public interest. They concern:

(A) Religious freedom in the Court room in a civil case.

(B) The responsibility of the Courts to exclude the identity of a litigant's religion from evidence where a case is tried before a jury, and the plaintiff is a member of a minority religion.

(C) The right under the 14th Amendment of a plaintiff in a civil case to the equal protection of the laws includ-

ing the equal applicability of the unreversed decision of the highest court in the state.

(D) And the right to know the reason for an Appellate Court's decision, especially where required by the Constitution of the state and Rule of Court.

Petitioner submits that a Writ of Certiorari should issue to the Supreme Court of Ohio for review of the final orders and judgments entered by it on February 3, 1972.

Respectfully submitted,

HYMAN B. ROSEN and
JOSEPH E. ROSEN
Attorneys for Petitioner

APPENDIX

ORDER FROM SUPREME COURT OF OHIO

THE SUPREME COURT OF THE STATE OF OHIO

1972 TERM

To wit: February 3, 1972

THE STATE OF OHIO,
City of Columbus.

No. 71-771

Dorothy Schwartz,
Appellant,

vs.

The Jewish Hospital Assn. of Cincinnati,
Appellee.

APPEAL FROM THE COURT OF APPEALS

for Hamilton County

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

Order from Supreme Court of Ohio

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .... day of ..... 19..

..... Clerk

..... Deputy

ORDER FROM SUPREME COURT OF OHIO

THE SUPREME COURT OF THE STATE OF OHIO

1972 TERM

To wit: February 3, 1972

THE STATE OF OHIO,
City of Columbus.

No. 71-771

Dorothy Schwartz,

Appellant,

vs.

The Jewish Hospital Assn. of Cincinnati,

Appellee.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS
for Hamilton County
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Rosen & Rosen.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .... day of ..... 19..

..... Clerk

..... Deputy

DECISION OF COURT OF APPEALS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. 11644

DOROTHY SCHWARTZ,
Plaintiff-Appellant,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,
Defendant-Appellee.

DECISION

(Filed October 12, 1971)

Messrs. Rosen and Rosen, for Plaintiff-Appellant,

Messrs. Rendigs, Fry, Kiely and Dennis, John P. Kiely of counsel, for Defendant-Appellee.

PER CURIAM.

This cause came on for hearing upon the appeal on questions of law, transcript of the original papers from the Court of Common Pleas of Hamilton County, the bill of exceptions, assignments of error, the briefs and arguments of counsel.

There are twelve assignments of error urged by the appellant which will be dealt with in numerical order.

The first assignment of error is not well taken for an examination of the evidence presented fails to disclose that the description of the area where the accident occurred

was such as to require the trial court to give Special Charge No. 2 as requested by the appellant. Special Charges numbered three and four were properly refused by the trial court in the form in which they were offered.

The second assignment of error is not well taken for the reason that Special Charge No. 21 was a correct statement of the law in the form in which it was offered and, while the inclusion of the words "under the same or similar circumstances" would have been proper, nevertheless, the failure to include these words was not error in the instant case.

The third assignment of error is not well taken for an examination of the general charge of the trial court and the evidence demonstrates that it was proper and correct in the form in which it was given to the jury in the light of the evidence in this case.

The fourth assignment of error is not well taken for the reason that there was no abuse of discretion on the part of the trial court in admitting into evidence the exhibits and testimony complained of by the appellant.

Likewise, there was no abuse of discretion on the part of the trial court in excluding the demonstration and the extended cross-examination of a witness as urged in appellant's fifth assignment of error.

The sixth assignment of error is not well taken for an examination of the record discloses that the court permitted the reading to the jury during their deliberations of those portions of the testimony which they requested.

The seventh assignment of error is not well taken because an examination of the entire record fails to disclose that the judgment was contrary to law. Nor does this examination disclose that the trial court was in error when it overruled appellant's motion for a new trial as urged in the eighth assignment of error.

The claim in the ninth assignment of error that it was error to overrule appellant's motion for a judgment notwithstanding the verdict and for judgment for the appellant is not borne out by the record and is not well taken.

The tenth and eleventh assignments of error are not well taken for the reason that the record fails to demonstrate such irregularity in the proceedings or errors of law of record occurring at the trial, objected to by the appellant which would require a reversal of the judgment entered by the trial court.

The judgment of the Court of Common Pleas of Hamilton County is affirmed. Counsel will present an entry conforming to this decision.

HESS, P. J., YOUNG and SHANNON, J.J.

PLEASE NOTE:

Counsel must present an entry pursuant to Rule 22, Rules of Appellate Procedure. If such entry is not submitted within the time specified in Rule 22, the Court will prepare and journalize an entry and the time for review will begin to run thereupon.

ENTRY OVERRULING MOTION TO CERTIFY IN COURT OF APPEALS

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. 11644

DOROTHY SCHWARTZ,
Plaintiff-Appellant,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,
Defendant-Appellee.

ENTRY

(Filed December 27, 1971)

This matter was submitted to the Court on Motion of the appellant herein for an order of this Court to certify this case to the Supreme Court of Ohio for review and final determination for the reason that the decision and judgment of this Court entered on November 30, 1971, is in conflict with the decisions and judgments of other Courts of Appeals of this State as set forth in the following reported cases:

DORSTEN v. LAWRENCE, 20 Ohio App. 2d 297, Lucas County, Sixth District,

SAMS v. READYMIX, 22 Ohio App. 2d 170, Montgomery County, Second District,

VENZIL v. CORNWALL, 103 Ohio App. 217, Franklin County, Tenth District,

ROBERTS v. BOHN, 26 Ohio App. 2d 50,
Mahoning County, Seventh District.

After due consideration, the Court finds said Motion is not well taken and ought to be overruled.

Wherefore, it is ORDERED and ADJUDGED that the Motion to Certify on the grounds of conflict be, and the same hereby is, overruled.

LETTER OF COURT OF COMMON PLEAS OVERRULING MOTION FOR NEW TRIAL

COUNTY OF HAMILTON
Court of Common Pleas
[Letterhead]

December 22, 1970

Rosen and Rosen,
Attorneys at Law,
1005 First Nat'l Bk. Bldg.,
Cincinnati, Ohio 45202.

Mr. John P. Kiely,
Attorney at Law,
907 Central Trust Tower,
Cincinnati, Ohio 45202.

Re: Dorothy Schwartz vs. Jewish Hospital Association of Cincinnati — A 233619.

Gentlemen:

This matter was submitted to the Court on Plaintiff's Motion for a New Trial, argument of counsel and memoranda.

The case was submitted to a Jury with the issues being negligence, contributory negligence and proximate cause. The Jury returned a verdict for the Defendant.

The cause was tried and submitted in June of 1970 and both Plaintiff and Defendant submitted special charges some of which were given by the Court and some of which were refused.

Plaintiff recites twelve reasons for her Motion and the Court has listened to the arguments of counsel and studied the memoranda and cases cited therein.

The Court is of the opinion that there was no prejudicial error and the Motion will be overruled.

Please present an entry reserving exceptions to the Plaintiff.

Very truly yours,

/s/ William R. Matthews
William R. Matthews, Judge.

WRM:mu.

ARTICLE IV, SECTION 5 OF THE OHIO CONSTITUTION

Article IV, Section 5 — [Additional powers of Supreme Court; supervision; rule making.]

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas temporarily to sit or hold court on any other court of common pleas or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each

house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law. (Adopted May 7, 1968.)

OHIO APPELLATE RULE No. 12

OHIO APPELLATE RULE

Rule 12

DETERMINATION AND JUDGMENT ON APPEAL

(A) Determination.

In every appeal from a trial court of record to a Court of Appeals, not dismissed, the Court of Appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. *All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.* (Emphasis ours)

EXCERPTS FROM PETITIONER'S BRIEF IN THE SUPREME COURT OF OHIO

Proposition of Law No. 2

The admission into evidence of the portions of numerous hospital records of different hospitals where the plaintiff was treated which recite the religion and the religious congregation to which the plaintiff belonged in a personal

injury action, which is not relevant to any issue in the case is in violation of plaintiff's rights under Article I, Section 7, of the Ohio Constitution and the First and Fourteenth Amendments to the U. S. Constitution and constitutes prejudicial error . . .

Proposition of Law No. 12

The failure of a Trial Court and an Appellate Court to follow and apply well-established principles of law enunciated by the Supreme Court of Ohio, which are being followed and construed as the applicable law in ten other Appellate Districts of Ohio to the detriment of the plaintiff deprives her of the protection of the equal operation of the laws of the State of Ohio and is in violation of the Fourteenth Amendment to the U. S. Constitution and Article I, Sections 1 and 16 of the Ohio Constitution and constitutes prejudicial error . . . .

Proposition of Law No. 13

Under Rule 12 (A) of the Ohio Appellate Rules where there are substantial questions of law or facts presented on appeal to a Court of Appeals, and many authorities are cited by the Appellant in support of the claimed prejudicial errors of the Trial Court, the Court of Appeals is not permitted to rule on each Assignment of Error in general terms without setting forth reasons or authorities for a finding or decision that there is no merit to the particular Assignment of Errors. The failure to do so constitutes a violation of Article 4, Section 5 of the Ohio Constitution . . . .

PETITIONER'S NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
AND
THE SUPREME COURT OF THE STATE OF OHIO

DOROTHY SCHWARTZ,
Plaintiff-Appellant,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,
Defendant-Appellee.

NOTICE OF APPEAL

Comes now the Appellant, Dorothy Schwartz and gives Notice of Appeal from the judgment entered in the Court of Appeals of Hamilton County, First Appellate District of Ohio on the 12th day of October, 1971 which affirmed the judgment in favor of the Appellee and against the Appellant, rendered by the Court of Common Pleas of Hamilton County, Ohio. Said Appeal is to the Supreme Court of Ohio.

An Application for Reconsideration filed by the Appellant in said Court of Appeals was overruled on October 21, 1971.

This case is one which did not originate in the Court of Appeals.

This case involves substantial Constitutional Questions, namely Article 1, Section 7 of the Ohio Constitution; Article 4, Section 5 of the Ohio Constitution; the First

Amendment to the U. S. Constitution and the Fourteenth Amendment to the U. S. Constitution.

ROSEN AND ROSEN,
Per: /s/ Hyman B. Rosen
1005 First National Bank Building
Cincinnati, Ohio 45202
Attorneys for Plaintiff-Appellant

PETITIONER'S ASSIGNMENT OF ERRORS IN COURT OF APPEALS

[Assignments of Error filed in Court of Appeals]

Dorothy Schwartz, Plaintiff-Appellant assigns the following errors committed to her prejudice by the Court of Common Pleas, Hamilton County, Ohio:

(1) The Trial Court erred in failing to give Plaintiff-Appellant's requested Special Charges.
(2) The Trial Court erred in giving Defendant-Appellee's requested Special Charges, to which Plaintiff objected.
(3) The Trial Court erred in its General Charge to the Jury to which Plaintiff-Appellant objected.
(4) The Trial Court erred in the admission of evidence offered by the Defendant-Appellee over the objection of the Plaintiff-Appellant.
(5) The Trial Court erred in the exclusion of evidence offered by the Plaintiff-Appellant.
(6) The Trial Court erred in permitting testimony to be read to the Jury during its deliberations over the objections of the Plaintiff-Appellant.
(7) The Judgment is contrary to law.

(8) The Trial Court erred in overruling Plaintiff-Appellant's Motion for a New Trial.

(9) The Trial Court erred in overruling Plaintiff-Appellant's Motion for Judgment notwithstanding verdict and for judgment for the Defendant.

(10) Irregularity in the proceedings.

(11) Error of law of Record occurring at the Trial and objected to by the Plaintiff-Appellant.

(12) The judgment is against the weight of the evidence and not sustained by sufficient evidence.

ROSEN AND ROSEN
By /s/ Hyman B. Rosen
Attorneys for Plaintiff-Appellant

EXCERPTS FROM PETITIONER'S BRIEF IN COURT OF APPEALS, PP. 19 AND 20

(4) THE TRIAL COURT ERRED IN THE ADMISSION OF EVIDENCE OFFERED BY THE DEFENDANT

(A) There was error in admitting in evidence the hospital record of The Jewish Hospital exhibit 31 (on Page 315, 316 R), dated October 13, 1967 over the objection of the Plaintiff which contained at least two objectionable matters:

(1) The history taken by Dr. Sewall, a resident of the hospital in which is recorded "Patient was wheeling her sister-in-law in corridor of The Jewish Hospital when she was knocked over by a laundry cart landing of her right side."

(2) The history to which no specific objection was made would be objectionable whether the party was Protestant, Catholic or Jewish. It is just something that has no business in a Court room and which could not have been produced by questioning of the parties as witnesses or by the use of other witnesses. It is irrelevant, tends to bigotry, and is prejudicial. It indicated Plaintiff's religion was Jewish.

This same material as to the religion of the Plaintiff and her church affiliations appear in other hospital records all of which are offered as exhibits by the Defendant. While no objection was made, the Court owes a duty to see that no religious or political matters are injected into the trial of a case. They have no business in any free society and particularly not in American court rooms. The admission of such matters unfortunately appeals to intolerant people and violates the highest concept of our Constitution, namely the right to the freedom of religion. The Court is not a powerless institution. It intervenes on its own with questions to jurors and witnesses. It is not necessary to call its attention to scurrilous or bigoted matters. The Court should have action taken on its own.

PETITIONER'S APPLICATION FOR RECONSIDERATION AND EXCERPTS FROM PETITIONER'S BRIEF IN COURT OF APPEALS

COURT OF APPEALS
HAMILTON COUNTY, OHIO

No. 11644

DOROTHY SCHWARTZ,
Plaintiff-Appellant,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,
Defendant-Appellee.

APPLICATION FOR RECONSIDERATION

Comes now Dorothy Schwartz, Plaintiff-Appellant and makes application to the Court for reconsideration of this cause in which the Court has rendered a decision, which has not been journalized, and which application is filed within the time provided for in Rule 26 of the Rules of Appellate Procedure.

ROSEN AND ROSEN

PER: /s/ Hyman B. Rosen
Attorneys for Plaintiff-Appellant

Excerpts from Petitioner's Brief in Court of Appeals

COURT OF APPEALS
HAMILTON COUNTY, OHIO

No. 11644

DOROTHY SCHWARTZ,
Plaintiff-Appellant,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,
Defendant-Appellee.

BRIEF OF PLAINTIFF-APPELLANT

Without waiving any of the Assignments of Error set forth in Plaintiff's original Brief and the Assignment of Errors heretofore filed, plaintiff requests reconsideration and further action of the Court in regards to the following:

(1) The Court's decision in regards to the fourth Assignment of Error is not in accord with law. This Court states "that there was no abuse of discretion on the part of the Trial Court in admitting into evidence exhibits and testimony complained of by the Appellant."

(A) The admission into evidence of the hospital records of the Jewish Hospital, Exhibit No. 31 (pp. 315, 316 R.) is not a matter of discretion on the part of the Trial Court but is absolutely prohibited by the ruling of the Supreme Court of Ohio in *Green* v. *City of Cleveland,* 150 Oh. St. 441 (Plaintiff's Brief – p. 18). The facts in *Green* v. *City of Cleveland* are identical with this case. * * *

* * *

(3) The decision of the Trial Court and of this Court violate the rights of the Plaintiff under the Ohio Constitution and the Constitution of the U. S. Reference is made

to the fact that the defendant's Exhibit of the Jewish Hospital records as well as three sets of records of the Good Samaritan Hospital went into evidence even though each of these records had a very distinct reference on the face of the same to the fact that the plaintiff was of the Jewish religion and the synagogue, of which she was a member. The injection of religion into this case violates *Article 1, Section 6 of the Ohio Constitution and the First Amendment and the 14th Amendment of the U. S. Constitution.* All of these sections of the Constitution precisely guarantee the freedom of the practice of religion and the lack of interference or burden thereon of any kind by either the State or Federal Government.

(4) Also, Plaintiff requests that Rule 12 (A) of the Ohio Rules of Appellate Procedures be complied with and that the Court state the reasons for its decision.

Plaintiff submits that the decision of the Court, in which it over-rules Plaintiff's Assignments of Error in general terms without assigning reasons therefor and without discussion or ruling on the various matters contained in every Assignment of Error does not meet the requirements of Rule 12 (A). This Rule was adopted in conformity with *Article 4, Section 5 of the Ohio Constitution*, so that the decision and opinion of the Court is not in conformity with the Ohio Constitution as well as the "due process provisions" of the 14th Amendment of the U. S. Constitution. The grounds for its opinion must be stated by a Court. *Public Service Commission* v. *Wisconsin Tel. Co.*, 289, U.S. 67; *Baltimore and Ohio R.R. Co.* v. *United States*, 279 U.S. 791 and *Railroad Commission* v. *Maxcy*, 281 U.S. 82.

ENTRY OF COURT OF APPEALS ON APPLICATION TO RECONSIDER

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. 11644

DOROTHY SCHWARTZ,
Plaintiff-Apellant,

vs.

THE JEWISH HOSPITAL ASSOCIATION OF CINCINNATI,
Defendant-Appellee.

ENTRY

(Filed October 21, 1971)

This matter was pending in this Court on the Motion of the appellant herein for an order of this Court granting application for reconsideration, brief of appellant, addendum to brief, and was submitted to the Court.

After due consideration, the Court finds said Motion not well taken and ought to be overruled.

Wherefore, it is ORDERED and ADJUDGED that the Motion for reconsideration filed by the appellant herein be, and the same hereby is, overruled.

PETITIONER'S OBJECTION TO HOSPITAL RECORD OF THE JEWISH HOSPITAL – PP. 349-350 OF THE RECORD

MR. HYMAN ROSEN: May I, your Honor, with specific parts of the hospital records. I am objecting to the portions of the hospital record that there is insurance or payment and I ask that be obliterated and portions to the plaintiff, that's not a matter for consideration of the jury and also ask that portions of the hospital record of the Jewish Hospital which indicate in the history as to the manner which this accident occurred other than the fact that she was struck by a cart that that be stricken and obliterated on the basis of Greene vs. City of Cleveland, 150 Ohio State 441, is only admissible as to matters necessary for the treatment of the patient. Any reference to fault other than as to the fact that basically how the accident occurred and the party was injured and certain circumstances how she was struck by the cart.

THE COURT: May I see what you are talking about?

MR. HYMAN ROSEN: Yes, your Honor.

MR. JOHN R. KIELY: Could I be heard on these matters, too, Judge?

MR. HYMAN ROSEN: Something to the effect that the cart was carrying dirty linen and wheeling her sister in the hall which I think are not relative to her treatment.

THE COURT: Overrule your objection.

EXCERPTS FROM MEMORANDUM OF PETITIONER ON MOTION FOR NEW TRIAL IN COURT OF COMMON PLEAS

ERROR IN THE ADMISSIBILITY OF EVIDENCE OFFERED BY THE DEFENDANT

There was error in admitting in evidence the hospital records of the Jewish Hospital dated October 13, 1967 over the objection of the plaintiff which contained at least two objectionable matters:

(1) The history taken by Dr. Sewall, a resident of the hospital in which is recorded "Patient was *wheeling* her sister-in-law in corridor of Jewish Hospital when she was knocked over by a laundry cart landing on her right side."

(2) The history which relates to the religion of the plaintiff, which would be an objection which plaintiff's counsel would have made whether the party was Protestant, Catholic or Jewish. It is just something that has no business in a Court Room and which could not have been produced by questioning of the parties as witnesses or by the use of other witnesses. It is irrelevant, tends to bigotry, and is prejudicial.

It has been established by the decision of the Supreme Court of Ohio, and it is the law of this state that no material in a hospital record can be introduced in evidence which recites in its history the manner in which the accident occurred or which contains information not necessary to the treatment of the patient. It has also been decided that the admission of such evidence is prejudicial error for which a judgment will be reversed. The authority is *Green* v. *City of Cleveland*, 150 Oh. St. 441.

EXCERPTS FROM PETITIONER'S BRIEF IN SUPPORT OF THE APPLICATION FOR RECONSIDERATION IN THE COURT OF APPEALS

"(3) The decision of the Trial Court and of this Court violate the rights of the Plaintiff under the Ohio Constitution and the Constitution of the U. S. Reference is made to the fact that the defendant's Exhibit of the Jewish Hospital records as well as three sets of records of the Good Samaritan Hospital went into evidence even though each of these records had a very distinct reference on the face of the same to the fact that the plaintiff was of the Jewish religion and the synagogue, of which she was a member. The injection of religion into this case violates *Article 1, Section 6 of the Ohio Constitution and the First Amendment and the 14th Amendment of the U. S. Constitution.* All of these sections of the Constitution precisely guarantee the freedom of the practice of religion and the lack of interference or burden thereon of any kind by either the State or Federal Government."